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IN THE

Supreme Court of the United States

October Term ____

No. 74-1410

KENNETH ROBERTS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	4
CONSTITUTIONAL PROVISIONS INVOLVED	5
FEDERAL REGULATIONS INVOLVED	5
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	6
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	11
APPENDIX A	1a
APPENDIX B	1b
APPENDIX C	1c

TABLE OF AUTHORITIES

Cases:

Bank of America Nat. T. & S. Assoc. v. Parnell, 77 S. Ct. 116, 352 U.S. 29 10

Baumgartner v. United States, 64 S. Ct. 1240, 322 U.S. 665 10

Belk v. Meagher, 104 U.S. 279 (1881) 10

Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963) 8, 9, 11

Boesche v. Udall, 83 S. Ct. 1373, 373 U.S. 472 (1963) 9

Brown v. Hitchcock, 19 S. Ct. 485, 173 U.S. 473 (1899) 9

Cameron v. United States, 252 U.S. 450 (1920) 9

Page

Cole v. Ralph, 40 S. Ct. 321, 252 U.S. 286 (1920) 10

Elder v. Wood, 208 U.S. 226 10

Foster v. Seaton, 106 U.S. App. D.C. 253, 271 F.2d 836 (1959) 10

Gonzales v. Landon, 76 S. Ct. 210, 350 U.S. 118 10

Gwillim v. Donnellan, 115 U.S. 45 10

Ickes v. Virginia-Colorado Dev. Corp., 295 U.S. 639 (1939) 10

Javierre v. Central Altagracia, 30 S. Ct. 598, 217 U.S. 502 10

Manuel v. Wulff, 152 U.S. 505 10

Northern Pac. R. Co. v. McComas, 39 S. Ct. 546 (1918) 9

Schneiderman v. United States, 63 S. Ct. 1333, 320 U.S. 118 10

Union Oil of California v. Smith, 249 U.S. 337 (1919) 10

United States v. C.E. Strauss, 58 I.D. 567 (1943) 10

United States v. Dow, 257 U.S. 17, 21 11

United States v. Nogueira, 403 F.2d 816 (9th Cir., 1968) 8

United States v. Springer, 491 F.2d 239 10

United States v. Toole, 224 F. Supp. 440 (1963) 9

United States v. 93.970 Acres, 360 U.S. 328 11

Wilbur v. United States, 46 F.2d 217 (1930) 10

Woodby v. Immigration Service, 87 S. Ct. 483, 385 U.S. 276 (1966) 10

Constitutional Provisions:

U.S. Constitution
Fifth Amendment 5, 10
Fourteenth Amendment 5

Page

Federal Statutes:

5 U.S.C. 556(d) 4, 10

28 U.S.C. 1234(1) 2

28 U.S.C. 1345 ..... 3, 4, 8, 9

43 U.S.C. 2 ..... 4, 8, 9

43 U.S.C. 1201 ..... 4, 8, 9

Federal Regulations:

43 C.F.R. 1852.2-1 ..... 5, 8

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No.

KENNETH ROBERTS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Kenneth Roberts, et al, petition this Court for a Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in the appendix to this petition, pages 1c to 13c, is reported at ____ F.2d ____ (1975). The opinion of the District Court for the District of Wyoming is printed in the Appendix to this Petition, pages 1a to 2b and is reported at ____ F.Supp. ____ (1974).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, affirming the Judgment of the United States District Court for the District of Wyoming, was dated and entered January 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1234(1).

QUESTIONS PRESENTED

1. Whether a United States Federal District Court has subject matter jurisdiction over government initiated action, under a quieting of titles complaint, which, in reality seeks an adjudication of the validity of unpatented mining claims?
2. Whether, in a government initiated action seeking a determination of the validity of unpatented mining claims, the United States of America is duty bound to first seek an administrative determination of that issue prior to seeking judicial review in a Federal District Court?

3. Whether in an action to quiet title and to adjudicate the validity of unpatented mining claims, under a quieting of titles action, an adequate remedy at law, specified by the Congress of the United States, precludes judicial intervention, pending an exhaustion of administrative remedies?

4. Whether a judicial determination made by a Federal District Court, declaring the validity or invalidity of unpatented mining claims, prior to a determination by the Bureau of Land Management, constitutes a taking of real property without just compensation and in violation of procedural due process of law under the United States Constitution?

5. Whether under the exception clause of 28 U.S.C. 1345, a Federal District Court is precluded, in the first instance, from entertaining subject matter jurisdiction over disputes between the United States and Private Citizens regarding the validity or invalidity of unpatented mining claims where Congress has specifically prescribed the specific tribunal to which the United States must first appeal prior to seeking an adjudication by a Federal District Court?

6. Whether an adjudication of the issue involving the validity or invalidity of unpatented mining claims by a Federal District Court which has not subject matter jurisdiction, renders any future government action barred by the doctrine of res adjudicata in actions involving the same parties and the same issues?

7. Whether in a government initiated mining claim contest, the government bears the burden of proof as required by 5 U.S.C. 556(d), since it is the government which is the proponent of a rule or order?

STATUTES INVOLVED

28 U.S.C. 1345 provides as follows:

"*Except as otherwise provided by Act of Congress,* the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

5 U.S.C. 556(d), provides as follows:

"Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

43 U.S.C. 2 provides in part as follows:

"The Secretary of the Interior or such other officer as he may designate shall perform all executive duties appertaining to the surveying and sale of public lands. . .or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

43 U.S.C. 1201 provides:

"The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specifically provided for."

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution.
Fourteenth Amendment, United States Constitution.

FEDERAL REGULATIONS INVOLVED

43 C.F.R. 1852.2-1 provides as follows:

"The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim."

STATEMENT OF THE CASE

The Respondents first initiated an action in the United States District Court for the District of Wyoming under a complaint entitled "Complaint to Quiet Title". In that action, the Respondent sought to quiet it's title and to remove a cloud upon its title to certain mineral lands situated in the Green River Formation, Wyoming. In the very same complaint, the Respondent alleged that the Petitioners had no right, title, or interest in and to the mineral lands for the reasons that the unpatented mining claims were not located in good faith for mining purposes; that no discovery of a mineral deposit(s) had been made upon any of the claim; that no locatable mineral deposits had been made on any of the claims and, the claims were not located in accordance with the requirements of the mining laws of the United States and the laws of the State of Wyoming in regard to fixing notices on and designating the boundaries of each claim.

The Petitioners, upon receipt of copies of the summons and complaints, filed a Motion for Summary Judgment attacking the jurisdiction of the Federal District Court, on subject matter jurisdictional grounds and upon noncompliance of showing that remedies at law were nonexistent. The Respondent filed no reply brief to the Petitioners' Motion for Summary Judgment. After argument on the Motion before the U.S. District Court, Petitioner's Motion to Dismiss was denied and the cause proceeded to Trial Status. Petitioners filed Answers to the complaint and certain interrogatories and request for production of documents. On December 4, 1973, the cause proceeded to Trial, to the Court. Petitioners again renewed Motion to Dismiss on ground that the Federal District Court lacked subject matter jurisdiction. That motion was again denied.

On December 26, 1973, the Trial Court entered a Judgment in favor of the Respondent, United States of America declaring the mining claims null and void for the reasons alleged in the complaint.

An appeal was taken to the United States Court of Appeals for the Tenth Circuit, Denver, Colorado. That appeal was heard by the Court in September, 1974. On January 14, 1975, the Circuit Court of Appeals for the Tenth Circuit affirmed the District Court's Judgment.

STATEMENT OF FACTS

One Merle I. Zweifel, one of the petitioners herein, had located several thousand unpatented mining claims over rich oil shale beds situated in the Green River Formation, Wyoming. The 267 claimants, some of them petitioners in this action, had hired Zweifel as an

agent-locator for purposes of locating certain mining claims. Zweifel filed location certificates for several thousand claims between 1965 and 1971. Those location certificates were filed with the County Recorders Office in the Counties where the lands or mining claims were situated. The government alleged that these claims constituted a cloud on its title to public lands and filed an action in the United States District Court to have the claims removed as a cloud upon its title and to seek a judicial declaration and order declaring the mining claims null and void for the reasons set forth in the complaint.[1] In a nonjury trial, the government presented six persons who had inspected some of the lands. These witnesses testified that they had not observed any mineral discovery or production activity, nor any posts, stakes or location notices, on any of the Zweifel claims. One witness testified that it would have been impossible for Zweifel to locate a vast number of unpatented mining claims on a given day.

The petitioners resisted the Court's jurisdiction by filing and arguing a Motion to dismiss on grounds that the District Court lacked subject matter jurisdiction, inter alia. The motions were denied and on Appeal to the Tenth Circuit Court of Appeals, the Court held that the Government may, at its election, proceed either in the administrative tribunal of the Department of the

[1] In government initiated action involving other unpatented mining claims over oil shale properties in Wyoming; the contests were initiated before the Bureau of Land Management, the proper Tribunal designated by Congress and the Secretary of Interior to determine issues of validity of mining claims.

Interior, or under 28 U.S.C. 1345, in the district court to clear title to public lands where the validity of unpatented mining claims is at issue and further pontificated that *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) did not hold to the contrary.

REASONS FOR GRANTING THE WRIT

This honorable Court's opinion in *Best v. Humboldt Placer Mining Company, supra,* has been subject to many varying interpretations by the various United States Circuit Court of Appeals. The precise questions as to whether or not a Federal District Court has subject matter jurisdiction to remove a cloud upon a title which an unpatented mining claim holder possesses but does not challenge before the Bureau of Land Management and whether a Federal District Court has jurisdiction under *28 U.S.C. 1345,* in government initiated mining claim contests, to declare unpatented mining claims invalid, are in need of final adjudication and resolution by this Honorable Court. Subsequent to this Court's decision in *Best, supra,* Federal District Courts and Courts of Appeals have intimated, by judicial decree, that the Government may initiate an action in the U.S. District Courts in order to vindicate its title to public lands subject to the mining laws of 1872.

The Tenth Circuit Court of Appeals has incorrectly applied this Court's holding in *Best, supra,* and has extended a rule of election, as to Forum, whenever the United States seeks to adjudicate the validity of an unpatented mining claim notwithstanding the exception clause in *28 U.S.C. 1345, 43 U.S.C. 2, 43 U.S.C. 1201* and *43 C.F.R. 1852.2-1.* The Tenth Circuit Court of Appeals relied heavily on *United States v. Nogueira,* 403 F.2d 816 (9th Cir. 1968).

The rule enunciated by this Court, time and time again, has clearly established that subject matter jurisdiction involving unpatented mining claim litigation is vested solely in the Secretary of the Interior, acting through the Bureau of Land Management and not the Federal Courts in the first instance. *Cameron v. United States*, 252 U.S. 450 (1920); *Best v. Humboldt, supra; Brown v. Hitchcock*, 173 U.S. 473, 19 S. Ct. 485 (1899); *Northern Pac. R.Co. v. McComas*, 39 S. Ct. 546 (1918); *Boesche v. Udall*, 373 U.S. 472, 83 S. Ct. 1373 (1963).[2]

Congress has provided that actions involving mining claims which are initiated by the government should be first initiated in the Land Department and not the Courts. By exception, under *28 U.S.C. 1345* non-conflicting jurisdictional overplay has been avoided and does not collide with nor does it clash with *43 U.S.C. 2* and *43 U.S.C. 1201* which clearly vests jurisdiction in the Secretary of the Interior and such officer as he may designate. The Government is bound to follow the prescribed course of procedure found in Congressional Statutes and the Rules and Regulations implementing them. *Section 1345*, supra, does not grant to the United States an election, at it's pleasure, of the proper Forum in which mining claim litigation should be initiated or commenced.

The imposing question as to burden or proof in government initiated mining claim contests has been summarily followed by Federal Courts in many

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[2] But see United States v. Toole, 224 F. Supp. 440 (1963), a similar action brought in the U.S. District Court (Montana). But in *Toole, supra*, jurisdiction under 28 U.S.C.A. 1345 *was not* in dispute.

instances where the rules of evidence applicable in Federal Courts take precedence over construction of *5 U.S.C. 556(d)* regarding burden of proof in government initiated mining claim contests brought before the proper administrative tribunal. This Court must finally lay to rest the judicial and administrative turmoil emanating from judicial construction of *5 U.S.C. 556(d)*, by re-examining or examining, in the first instance, *United States v. C.E. Strauss*, 58 I.D. 567 (1943); *Foster v. Seaton*, 106 U.S. App. D.C. 253, 271 F.2d 836 (1959); *United States v. Springer*, 491 F.2d 239. But compare, *Javierre v. Central Altagracia*, 30 S. Ct. 598, 217 U.S. 502; *Bank of America Nat. T. & S. Assoc. v. Parnell*, 352 U.S. 29, 77 S. Ct. 116, *Woodby v. Immigration Service*, 87 S. Ct. 483, 385 U.S. 276 (1966) *Schneiderman v. United States*, 63 S. Ct. 1333, 320 U.S. 118; *Baumgartner v. United States*, 64 S. Ct. 1240, 322 U.S. 665; *Gonzales v. Landon*, 76 S. Ct. 210, 350 U.S. 118.

Until the Bureau has declared an unpatented mining claim invalid, the claim is real property in the fullest sense of the word and the possessory interest acquired therein is good against the whole world including the United States of America. *Cole v. Ralph*, 40 S. Ct. 321, 252 U.S. 286 (1920); *Union Oil of California v. Smith*, 249 U.S. 337 (1919); *Manuel v. Wulff*, 152 U.S. 505; *Gwillim v. Donnellan*, 115 U.S. 45; *Belk v. Meagher*, 104 U.S. 279 (1881); *Elder v. Wood*, 208 U.S. 226; *Wilbur v. United States*, 46 F.2d 217 (1930); *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639. A proceeding brought before a Forum, not having jurisdiction, constitutes a taking of real property without just compensation and is violative of the Fifth

Amendment of the U. S. Constitution and this Court's pronouncements in *Best v. Humboldt Placer Mining Co., supra,; United States v. Dow*, 257 U.S. 17, 21; *United States v. 93.970 Acres*, 360 U.S. 328.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Writ of Certiorari to review the Decision of the United States Court of Appeals for the Tenth Circuit be granted; That an Order to that effect be entered, and the Court below and the Counsel be notified of the Granting of the Petition.

Respectfully submitted,

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APPENDIX A

Exhibit
2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	NO. 5784
MERLE I. ZWEIFEL, et al., Defendants.	)	CIVIL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Court, sitting without a jury, on December 5, 1973, the Plaintiff appearing by its attorneys, Richard V. Thomas, United States Attorney for the District of Wyoming, and Albert V. Witham, Attorney, Office of the Regional Solicitor, Department of the Interior, and some of the Defendants appearing by their attorneys, Mr. Clement Theodore Cooper and Mr. Franklin J. Smith, and the rest of the Defendants not appearing, and the Court having reviewed the pleadings and legal memoranda on file herein, and having heard the evidence submitted at the trial and drawing all reasonable inferences therefrom, and having heard all the arguments of counsel, and the Court now being fully advised, does, pursuant

to Rule 52 Federal Rules of Civil Procedure, find the facts specially, and states separately its Conclusions of Law thereon.

FINDINGS OF FACT

1. This is an action brought by the Plaintiff seeking to quiet its title to certain interests in lands located within the State of Wyoming and to remove, any cloud upon its title to those interests.

2. This Court has jurisdiction of the subject matter of this action pursuant to Title 28, United States Code, Section 1345, and the Court has jurisdiction over the parties to this action, all of whom have entered a general appearance, and all of whom were properly served in accordance with the provisions of Title 28, United States Code, Section 1655.

3. The Plaintiff, the United States of America, owns and is in possession of the mineral interests in and to the lands which are the subject of this action, as recited in the document attached hereto as Appendix A, which adopts the legal descriptions of the lands by reference to the Complaint.

4. The lands which are the subject matter of this action are situated within the State and District of Wyoming.

5. Certain unknown private parties or the State of Wyoming who are not parties to this action, own and are in possession of certain mineral interests in and to some of the subject lands which interests, shown as exceptions in Appendix A, are not owned by the United States, but were inadvertently included in the interests in lands described in the Complaint.

6. The Defendants, or some of them, caused to be recorded placer mining location certificates in the Office of the County Clerk and Ex-Officio Registrar of Deeds, or equivalent office, in several counties in the State of Wyoming, which certificates are listed in Appendix B, attached hereto.

7. Six (6) witnesses testified that they had inspected some of the lands which are the subject of this action, the descriptions of which are recited in Appendix C attached hereto, and that they have found no evidence of location work, location stakes, location certificates, exploration work, development work, or mining activities upon any of the lands which they had inspected accomplished by any of the Defendants in this action.

8. The lands referred to in Appendix C attached hereto constitute a representative sample of all of the lands which are the subject of this action, and there has been no location work, location staking, posting of location certificates, exploration work, development work, or mining activities upon any of the lands which are the subject of this action by any of the Defendants.

9. None of the Defendants physically located any of the mining claims, the location certificates of which are recited in Appendix B hereto, on any of the lands covered by such location certificates, or referred to in the Complaint in this action.

10. None of the Defendants made any discovery of a mineral deposit on any of the mining claims, the location certificates of which are recited in Appendix B hereto, on any of the lands covered thereby, or referred to in the Complaint in this action.

11. None of the Defendants has ever conducted any mining activity of any nature on any of the lands which

are the subject of this action, by exploration work, assessment work, development work, mining, or otherwise.

12. The Defendant, Merle I. Zweifel, or any entity or association using the name of "Zweifel", never has paid any Wyoming State ad volorem taxes on minerals produced from any of the subject lands from the time of the purported location of the said mining claim to the present.

13. The Defendant, Merle I. Zweifel, or any entity or association using the name of "Zweifel", has never applied for or received a permit from the appropriate governmental agency of the State of Wyoming to produce minerals from any of the subject lands from the time of the purported location of the said mining claims to the present.

14. The Defendant, Merle I. Zweifel, has not, nor have any of the other Defendants, developed any mine on any of the lands which are the subject of this action.

15. In light of the other facts of circumstances of this case, a period of 2½ years or more is a reasonable time within which the defendant's should have developed any valuable minerals deposits if such valuable mineral deposits actually existed on the lands referred to in the Complaint.

16. Over 2,400 of the mining claims recited in the location certificates which are listed in Appendix B purportedly were actually located on February 25, 1971, and more than 140 of the said mining claims purportedly were actually located on May 25, 1974.

17. One person could not physically locate in the State of Wyoming in one day as many as 100 association placer mining claims, and it was impossible

for the Defendant, Merle I. Zweifel, to have located 2,400 claims on February 25, 1971 and more than 140 claims on May 25, 1971.

18. The mining claims which are the subject matter of this action were not located in good faith for mining purposes as required by the mining laws of the United States.

19. There has been no discovery of mineral deposits locatable under the mining laws of the United States or of any valuable mineral deposits made on any of the claims which are the subject matter of this action.

20. The claims which are the subject matter of this action were not located in accordance with the requirements of the mining laws of the United States and the State of Wyoming with respect to fixing notice on and designating the boundaries of each claim.

21. After the filing of the location certificates the Defendant Merle I. Zweifel addressed letters to the lessees of some of the minerals demanding that they account to him for the minerals he purportedly had located on these mining claims.

22. The Defendants offered no testimony or evidence at the trial of this case.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to this action and the subject matter of this action in accordance with Title 28, United States Code, Sections 1345 and 1655.

2. This Court has the power and authority under the law, in an action brought by the United States to quiet title, to determine the validity of any unpatented

mining claims purportedly located on lands in which all or part of the minerals are owned by or reserved unto the United States, and to adjudge such claims invalid.

3. This Court has the power and authority, in an action brought by the United States to quiet its title to mineral interests, to adjudge invalid any mining claims purportedly located on lands of the United States, but the mineral interests of which are owned by third parties or the State of Wyoming.

4. This Court has the power and authority to quiet title in the United States to lands situated in the State and District of Wyoming in which the United States owns the mineral interests.

5. This Court has the power and authority to quiet title to lands situated in the State and District of Wyoming in which non-parties included in the State of Wyoming own the mineral interests, where mining claims purportedly were located upon such lands as lands of the United States.

6. An unpatented mining claim purportedly located under the mining laws of the United States on lands in which the United States does not own the locatable minerals patently is void.

7. In order to acquire a valid mining claim on lands of the United States in which the United States has reserved all or part of the minerals, it is necessary that the mining claim be located in good faith for mining purposes in accordance with the mining laws of the United States; it is further necessary that there be a discovery of mineral deposits locatable under the mining laws of the United States; it is further necessary that there be a discovery of valuable mineral deposits on such lands; and such claims must be located in accordance with the requirements of the mining laws of

the United States in the State of Wyoming with regard to fixing notice on or designating boundaries of each claim. Section 2, 5 and 10 of the Act of May 10, 1872, 17 Stat. 91, 92, 94 as amended, 30 U.S.C. Sections 23, 28 and 35; Act of July 9, 1870, 16 Stat. 217; and Section 30-10, Wyoming Statutes 1957, as amended.

8. The plaintiff, the United States of America, established each essential and material allegation in its Complaint by a preponderance of the evidence, including:

a. The United States owns certain mineral interests in and to certain of the lands which are the subject matter of this action.

b. The mining location certificates recited in Appendix B constitute clouds upon the title to the mineral interests owned by the United States and upon those of non-parties including the State of Wyoming, and constitute claims by the several defendants of some right, title, interest, or state in unto or are part of some mineral ownerships.

c. The Defendants and each of them have no right, title, interest, or estate in and to said lands in which the United States owns the locatable minerals on the grounds and for the reasons that:

1. These claims were not located in good faith for mining purposes as required by the mining laws of the United States.

2. No discovery of mineral deposits locatable under the mining laws of the United States has been made on any of the said claims.

3. No discovery of valuable mineral deposits has been made on any of said claims.

4. These claims were not located in accordance with the requirements of the mining laws of the United States and the State of Wyoming with regard to fixing notice on and designating the boundaries of each claim.

9. In an action such as this the Defendant has the burden of proving by a preponderance of the evidence that each of the mining claims evidenced by the location certificates recited in Appendix B, and which are included in Government's Exhibit 3, was valid and subsisting under the mining laws of the United States as of the date of trial.

10. To sustain this burden the mining claimant must prove by a preponderance of the evidence that he has physically found a mineral deposit on each claim on lands susceptable of location under the applicable mining laws of the United States; that the mineral deposit so found is locatable under said laws; and that the mineral deposit so found is valuable under said laws.

11. When a mining claimant fails to develop his mining claim for minerals in a reasonable period of time from and after the purported location, in light of all of the facts and circumstances, there is a rebuttable presumption in favor of the United States that no valuable mineral deposit has been discovered on the claim as required by the mining laws of the United States.

12. Under the facts and circumstances of the present case, a period of approximately 2½ years or more is a reasonable time within which a mining claimant should be required to develop his claim for minerals in order to demonstrate the existence of a valuable mineral

deposit therein, so as to avoid the presumption in favor of the United States that no valuable mineral deposit has been discovered on the claim.

13. Because of the physical impossibility of locating more than 2,400 association placer mining claims in one day or even as many as 140 on any one day the location certificates recited in Appendix B do not constitute valid recorded documents sufficient to support any claim of right, title or interest on the part of the Defendants in this action to the lands covered by any such location certificate.

14. Each unpatented association placer mining claim purportedly located by the Defendants or any of them evidenced by the location certificates recited in Appendix B, and comprising Government's Exhibit No. 3 in this case is null and void.

15. Such a recorded location certificate containing recitals of location or discovery is not evidenced of such location or discovery and creates no presumption thereo, but instead such recitals are ex parte, self serving declarations, only.

16. The Plaintiff is entitled to a judgment declaring the said location certificates which are recited in Appendix B null and void and of no effect; ordering that they be removed as a cloud upon the Plaintiff's title, or upon the title of any owner other than the Plaintiff; and quieting the title of the Plaintiff for any third party owner to the mineral interests in such lands.

17. Under all of the facts and circumstances it is appropriate that the Defendant Merle I. Zweifel, or anyone acting for him or on his behalf, be enjoined from the recording of any mining location certificates relating to federal lands within the State and District of

Wyoming unless he shall first have established, prior to such recording, that he has complied with the location and discovery requirements of the mining laws of the United States and the State of Wyoming.

Dated: _____

_____

EWING T. KERR
United States District Judge

APPENDIX B

[Caption ommitted in printing]

JUDGMENT

This case came on for trial before the Court, sitting without a jury, on December 5, 1973, the plaintiff appearing by its attorneys, Richard V. Thomas, United States Attorney for the District of Wyoming, and Albert V. Witham, Attorney, Office of the Regional Solicitor, Department of the Interior, and some of the Defendants appearing by their attorneys, Mr. Clement Theodore Cooper and Mr. Franklin J. Smith, and the rest of the Defendants not appearing, and the Court having entered in this case its Findings of Fact and Conclusions of Law, it hereby is ORDERED, ADJUDGED, AND DECREED that:

1. The Plaintiff, the United States of America, and the State of Wyoming, and unknown third parties, and those claiming under them own in free simple and are entitled to the quiet and peaceful possession of that real property referred to in the Complaint and in the list of purported mining location certificates attached hereto as Exhibit 1, including all the minerals.

2. The purported mining claim location certificates which were filed of record by the Defendants and which are referred to in the list attached hereto as Exhibit 1 are null and void and of no effect, and the Defendants' claims to said property are without any right whatever, and the Defendants' have no estate, right, title, lien or interest in and to the property

described in this Complaint and in the list of recorded location certificates attached hereto as Exhibit 1, or any part thereof, including the minerals.

3. The Defendants should be, and they hereby are, enjoined from claiming any estate, right, title or interest in and to the property referred to in this Complaint adverse to the ownership of the Plaintiff, any third parties, or the State of Wyoming by virtue of the recorded location certificates listed in Exhibit 1 attached hereto.

4. The Defendant Merle I. Zweifel and all those acting for him or on his behalf or for any business entity conducted or operated by him should be, and they hereby are, enjoined from filing of record in the office of the County Clerk and Ex Officio Registrar of Deeds of any County in the State and District of Wyoming any certificate of location for any mining claim on federal lands without first demonstrating that the claim actually has been located on the ground and that a valuable discovery of minerals has been made thereon in accordance with the laws of the United States and the State of Wyoming.

5. For the purpose of effectuating this Judgment, a certified copy of the text of Judgment, together with that portion of the list of recorded certificates of location attached hereto as Exhibit 1 which applies to each county shall be recorded in the respective counties in with the lands included in this action and referred to in this Judgment are located.

Dated: _____

/s/ Ewing T. Kerr
EWING T. KERR
United States District Judge

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term, 1974

FILED
JAN 14 1975
HOWARD K. PHILLIPS
Clerk, United States
Court of Appeals
Tenth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 74-1087 (5784)
MERLE I. ZWEIFEL, KENNETH ROBERTS, et al., Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF WYOMING

Clement Theodore Cooper, Washington, D.C. (Franklin J. Smith, Cheyenne, Wyoming, with him on the brief) for Appellants.

Jacques B. Gelin, Washington, D.C. (Wallace H. Johnson, Assistant Attorney General Richard V. Thomas, United States Attorney; and Terrence L. O'Brien, Washington, D.C., with him on the brief) for Appellee.

Before LEWIS, Chief Judge; HOLLOWAY, Circuit Judge; and CHRISTENSEN, District Judge.

LEWIS, Chief Judge.

Twenty-seven persons who, through Merle I. Zweifel, filed association mining claim certificates covering large tracts of public land in Wyoming, appeal from a judgment of the United States District Court for the District of Wyoming invalidating their claims and quieting title to the lands in the United States. This appeal turns on the questions whether the district court had jurisdiction over the government's suit and, if so, whether the court could properly exercise jurisdiction in view of the government's failure to seek a prior administrative determination of the validity or invalidity of the mining claims alleged to cloud the government's title.

I.

Zweifel advertised a claim-staking service and thereby induced the appellants and others to invest in his plan to stake association placer mining claims covering protions of the Green River Formation in Wyoming. Zweifel filed location certificates for several thousand such claims between 1965 and 1971. After filing the

certificates, Zweifel communicated with firms holding coal prospecting permits or leases for the same lands; citing the Multiple Mineral Development Act, 30 U.S.C. §526(e), he demanded survey and other information from those firms, and he requested that agreement be reached for the processing and extraction of locatable minerals commingled in the coal deposits.

On October 17, 1972, the United States brought suit against some 267 claimants, including the appellants, to invalidate claims that Zweifel purported to have located throughout nine counties of Wyoming. The government alleged that these claims constituted a cloud on its title to public lands. In a nonjury trial, the government's witnesses included six persons who, as geologists or mining engineers, had inspected some of the lands for which Zweifel had filed location certificates. They testified that they had observed no mineral discovery or production activity, nor any posts, stakes or location notices, on any of the Zweifel claims. An official of the Wyoming Tax Department testified of the absence of any record of mineral production for purposes of assessing state ad valorem taxes on production. An official of the Wyoming Department of Environmental Quality testified of the absence of any application by Zweifel for a permit to mine, mill, or disturb the surface for discovery or development work, as required by Wyoming law.[1] Finally, officials of the Bureau of Land Management testified that insofar as they had

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[1]The Wyoming Environmental Quality Act, Wyo. Stat. §35-502.1 *et. seq.*, effective in 1973, requires miners and prospectors obtain a license for discovery work that disturbs the land's surface by dozing. Wyo. Stat. §35-502.30-31. Prior law in effect since 1969 required permits for mining and milling operations only.

inspected Zweifel's claims they had observed no development or mining activity. A BLM inspector testified that it would have been impossible for Zweifel to locate, as his filed location certificates indicate, 2,000 mining claims in one day. The appellants presented no evidence; the court took notice, however, of interrogatories tending to show that Zweifel had represented to the appellants that he or his agents had performed necessary location and discovery work on the claims.

An understanding of the court's ruling requires a brief summary of applicable mining law. Federal law requires that mining locations be made in good faith for the purpose of mining, processing or prospecting for valuable minerals. 30 U.S.C. §612; United States v. Nogueira, 9 Cir., 403 F2 816. Locations must be distinctly marked on the ground, and not less than $100 worth of labor must be performed or improvements made annually on each claim. 30 U.S.C. §28. A locator's failure to comply with these requirements opens the claim or mine to relocation by others just as if no location had ever been made. *Id.* Federal law also subjects mineral locators to such state location requirements as are not inconsistent with federal mining provisions. Kendall v. San Juan Silver Mining Co., 144 U.S. 658. Wyoming law requires the discoverer of any placer claim to file, within 90 days of discovery, in the office of the county clerk, a location certificate containing, *inter alia*, the date on which location work was performed. Wyo. Stat. §30-10. Before filing the certificate, the discoverer must have located the claim by marking its surface boundaries with "substantial

monuments." *Id.* §§30-3, 30-10.[2] Under both federal and state law, a valid mining location cannot be made without a discovery of valuable minerals within the claim. 30 U.S.C. §23; Best v. Humboldt Placer Mining Co., 371 U.S. 334; Dean v. Omaha-Wyoming Oil Co., 21 Wyo. 133, 128 P. 881. *See* 1 Rocky Mntn. Mineral Law Foundation, American Law of Mining § 4.13 *et seq.* "Discovery" in this context means the actual physical disclosure of a valuable mineral deposit. Henault Mining Co. v. Tysk, 9 Cir., 419 F2 766. A "valuable" mineral deposit is one "that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." United States v. Coleman, 390 U.S. 599, 602, *quoting* Castel v. Womble, 19 L.D. 455, 457.

The court below held that the challenged Zweifel claims constituted a cloud on the title of the United States to public lands and that the government had proved prima facie that the claims were invalid on the following grounds. (1) The claims were not located in good faith for mining purposes. (2) The claimants made no discovery of mineral deposits locatable under federal mining law. (3) The claimants made no discovery of valuable mineral deposits. (4) The claims were not located in compliance with federal and state procedures with respect to the fixing of notice on and designating the boundaries of each claim.

The court based its jurisdiction upon 28 U.S.C. §1345, which vests the district courts with jurisdiction

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[2] Wyoming law also requires the annual performance of $100 or more assessment work. Wyo. Stat. §§30-11, 30-12, 30-14.

in all civil actions commenced by the United States, except as otherwise provided by Congress. The appellants' chief argument both at trial and on appeal is that the statutes giving the Secretary of the Interior plenary authority over the administration of public lands[3] and the regulations authorizing the government to initiate administrative proceedings to invalidate mining claims[4] create an exception to section 1345's jurisdictional grant to the district courts. Appellants thus contend that the Department of the Interior has exclusive original jurisdiction over actions commenced by the government for the sole purpose of invalidating unpatented mining claims. Appellants infer that the government has attempted to obscure the jurisdiction

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[3] 43 U.S.C. §2 provides in part:

> The Secretary of the Interior or such other officer as he may designate shall perform all executive duties appertaining to the surveying and sale of public lands ... or in anywise respecting such public lands, and, also, such as relate to private claims of land, under the issuing of patents for all grants of land under the authority of the Government.

43 U.S.C. §15 provides in part:

> All patents for public lands shall be issued and signed by the Secretary of the Interior in the name of the United States....

43 U.S.C. §1201 provides:

> The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specifically provided for.

[4] 43 C.F.R. §4.451-1.

issue by styling its action to invalidate mining claims as one to quiet title. We begin by denying that the government acted improperly in this respect.

II

A discovery of valuable minerals by a qualified locator upon unappropriated public land creates substantial rights in the locator as against the United States. If one locates, marks and records his claim in accordance with federal and state law, he has "an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals . . . without paying any royalty to the United States as owner, and without ever applying for a patent or seeking to obtain title to the fee . . . ." Union Oil Co. v. Smith, 249 U.S. 337, 348-49. Location and recordation of claims without actual discovery of valuable minerals, or recordation without marking the claim in compliance with federal and state law casts a cloud on the title of the United States. *See* Cameron v. United States, 252 U.S. 450; Davis v. Nelson, 9 Cir., 329 F2 840. The authority of the Secretary of the Interior, or of the Justice Department at the behest of the Secretary, to contest the validity of mining claims on public lands is not dependent upon the assertion by the United States of some contemplated use for the lands in question. "Establishment of clear title is itself sufficient justification for the action." Davis v. Nelson, *supra* 329 F2 at 846.

As the appellants observe, private claimants are prohibited from seeking federal court interference with proceedings to determine the validity of claims pending

before the Department of the Interior. Once the Secretary has initiated an administrative contest, the jurisdiction over the courts is withdrawn as respects suits filed by *private* claimants either to halt the administrative proceedings or to substitute the court's determination of claim validity for that of the Interior Department. *See* Northern Pac. Ry. v. McComas, 250 U.S. 387; United States v. Hitchcock, 190 U.S. 316; Brown v. Hitchcock, 173 U.S. 473. These authorities, however, do not foreclose the government's entering federal court to vindicate its title to public lands. United States v. Nogueira, 9 Cir., 403 F2 816. Nor do the statutes conferring upon the Secretary authority over the administration of public lands constitute, by their terms, an exception to federal court jurisdiction under 28 U.S.C. §1345. To read into these statutes an implied exception to the general grant of jurisdiction would, in cases like the present one, pointlessly defeat the policy of the mining laws to keep the public mineral lands open to qualified locators and thereby to encourage discovery of valuable deposits. *See* 30 U.S.C. §22; United States v. Coleman, 390 U.S. 599. Were we to insist upon full administrative consideration of patently invalid claims, followed by court review of administrative action, we would needlessly prolong the period during which qualified locators would forbear from discovery work on the clouded lands.

We therefore hold that the United States may, at its election, proceed either in the administrative tribunal of the Department of the Interior or, under 28 U.S.C. §1345, in the district court to clear title to public lands where the validity of unpatented mining claims is at issue.

Best v. Humboldt Placer Mining Co., 371 U.S. 334, is not to the contrary. There the Supreme Court held that the United States could properly resort to administrative proceedings even though it had possession of the property by virtue of a condemnation suit instituted in federal court. The Court's decision in *Best*, significantly, bore upon the propriety of coordinated judicial and administrative inquiries into the government's rights in mineral lands. Although the Court sounded general approval of district court *abstention* with respect to issues uniquely within the particular expertise of the Department of the Interior (*see* discussion *infra*), *Best* cannot be read to limit federal court jurisdiction over civil suits initiated by the government. Rather the law remains that the United States, having title to public lands, is free to vindicate its rights therein either before the Interior Department or in the courts "at its election if proceedings are initiated by it." Kennedy v. United States, 9 Cir., 119 F2 564, 565. *See also* United States v. Schultz, N.D. Cal., 31 F2 764; United States v. Mobley, S.D. Cal., 45 F. Supp. 407.

Appellants' more compelling argument is that even if the district court had jurisdiction over the government's action, the court should nevertheless have deferred to the Department of the Interior for an administrative determination of the Zweifel placer claims' validity. "When there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved." Port of Boston Marine Terminal Assn v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68. The principal reason behind the practice of so routing certain issues to agency tribunals is the need for orderly and sensible

coordination of the work of agencies and of the courts. "Whether the agency happens to be expert or nor, a court should not act upon subject matter that is peculiarly within the agency's specialized filed without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become the victims of unco-ordinated and conflicting requirements." 12 Davis, Administrative Law Treatise §19.01 (1958).

Certainly the Interior Department is charged with primary responsibility for determinations of the validity of mining claims. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337. But we believe that the court below correctly refused to insist upon a prior administrative inquiry to the challenged Zweifel claims for two reasons.

First, the agency to which appellants would have the court turn was itself very much a part of this litigation, and the agency's position with respect to the claims was clear. The suit was filed at the behest of the Secretary of the Interior. An inspector for the Bureau of Land Management testified as to the physical impossibility of Zweifel's having located some 2,000 claims, as the location certificates indicated. Moreover, the Department of the Interior's views as respect Zweifel's failure to do development work on appellants' claims should be abundantly clear from a line of the Department's decisions spanning eighty years.[5]

[5] If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction. *E.g.*, United States v. Humboldt Placer Mining Co., 8 IBLA 407 (1972); United States v. Ruddock, 52 L.D. 313 (1927); Castle v. Womble, 19 L.D. 455 (1894).

Second, the conclusion of the court below that Zweifel did not locate appellants' claims in good faith for mining purposes did not involve a factual inquiry with respect to which courts, because of their relative inexperience in the area, must defer to the expertise of the Interior Department. The issue of good faith in filing location certificates involves an inquiry into the intent of the locator. United States v. Nogueira, *supra*, 403 F2 at 823. Courts, we submit, regularly decide such questions, and the district court in the present case was fully qualified to do so. An important principle underlying the doctrine of primary administrative jurisdiction is that "in cases raising issues of fact not within the conventional experience of judges . . . agencies created by Congress for regulating the subject matter should not be passed over." Far East Conference v. United States, 342 U.S. 570, 574. The desirability of court abstention diminishes where the court faces factual issues of the sort that it considers routinely.[6]

[6]Appellants make the related contention that the district court improperly granted equitable relief where an adequate remedy at law—that is, agency invalidation of the claims—was available to the government. Since we are of the view, expressed above, that proceedings before the Department of the Interior would result in pointless continued impairment of the public's rights of access to lands covered by the Zweifel claims, we believe that the government cannot be said to have had an adequate remedy at law. The law does not require needless resort to administrative proceedings as a prerequisite to equitable court intervention. Bannercraft Clothing Co. v. Renegotiation Board, D.C. Cir., 466 F2 345, 359.

III

Appellants acknowledge the established rule that in an action to contest mining claims the government bears the burden of establishing prima facie the invalidity of the claims, the burden then shifting to the claimant to prove that his claims are valid. United States v. Springer, 9 Cir., 491 F2 239; Foster v. Seaton, D.C. Cir., 271 F2 836. Appellants do not apparently dispute that the government established prima facie the invalidity of their claims. Rather they urge reexamination of the rule requiring only prima facie proof of invalidity in light of the general federal principle that the party who has pleaded the existence or non-existence of a fact must bear the whole burden of proving the same.

In both *Foster* and *Springer* claimants sought court review of adverse rulings by the Interior Department. They argued that the rule requiring the government to make only a prima facie showing of claim invalidity in agency contests contravened provisions of the Administrative Procedure Act that require the proponent of a rule or order to bear the burden of proof, except as otherwise provided by statute. In response to this argument both courts reasoned as follows. The mining laws give a person the right to initiate a claim to public lands by means of the unilateral act of entry. After he complies with all the requirements of the law as to discovery, location, and assessment work, his entry may ripen into a claim against the United States. In a contest proceeding, therefore, the claimant rather than the government is the proponent of a ruling that he has

complied with applicable mining laws. The government must go forward with sufficient evidence to establish prima facie the invalidity of contested claims, and the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. United States v. Springer, *supra*, 491 F2 at 242; Foster v. Seaton, *supra*, 271 F2 at 838.

We believe the same reasoning applies in the present quiet title action. "Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the government undertook the affirmative burden of proving that no valuable deposit existed." Foster v. Seaton, *supra*, 271 F2 at 838. We agree with the cited authorities that Congress did not intend to place this burden on the Secretary of the Interior.

We have considered appellants' other assignments of error and believe them to be similarly without merit. The judgment of the court below is therefore affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1410

KENNETH ROBERTS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition for a writ of certiorari was not timely filed. The judgment of the Court of Appeals for the Tenth Circuit in this civil suit was entered on January 14, 1975 (Pet. App. C). The 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on April 14, 1975. The time for filing a petition for a writ of certiorari was not extended, and the petition was not filed until May 9, 1975.

The time limit specified by 28 U.S.C. 2101(c) is jurisdictional, *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418; accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1410

KENNETH ROBERTS, *et al.*,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners, Kenneth Roberts, et al, petition this Court for a Rehearing on Petition for Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Tenth Circuit. In support of the Petition for Rehearing, Petitioners show to Court as follows:

GROUNDS FOR REHEARING

A. The Tenth Circuit Court of Appeals entered a final judgment and Order in the above cause upholding jurisdiction of the United States District Court in adjudicating the validity or invalidity of unpatented mining claims, under the guise of a quieting of title action. In order to preserve the uniformity of decisions by this Honorable Court, as to jurisdiction, that is, whether adjudication of unpatented mining claims is vested solely in the Land Department or, concurrently, in the Land Department and the Federal District Courts, a rehearing on the Petition for Writ of Certiorari is imperative in order to invoke this Court's power of supervision over this action where the lower courts have so far departed from the accepted and usual course of judicial proceedings or, in the very least, the Court of Appeals has so far sanctioned such a departure by the lower court. Further, the Tenth Circuit Court of Appeals has decided a federal question in a way which conflicts with the applicable decisions of this Court.

B. The care and disposal of public lands is vested in the United States Congress. The Congress has the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. *U. S. Const. art. IV. #3, cl. 2. Article IV, supra*, permits and authorizes the Congress, and its agents, to act or authorize others to do so, to exercise that authority in an exclusive, proprietary, absolute, plenary, complete, and unlimited way. *Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958); Alabama V. Texas, 347 U.S. 272, 273, 274 (1954); United States v. San Francisco, 310 U.S. 16, 30 (1940); Sinclair v. United States, 279 U.S. 263, 294 (1929);*

Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915); Van Brocklin v. Tennessee, 117 U.S. 151, 168 (1886); Gibson v. Chouteau, 80 U.S. (13 Wall.), 92, 99 (1872); Witherspoon v. Duncan, 71 U.S. (4 Wall.) 210, 219 (1867);

C. If patents have not issued by the Land Department, controversies over the claims should be solved by appeal to the land department and not to the courts. *Brown v. Hitchock, 173 U.S. 473, 477, 19 S. Ct. 485 (1899); Northern P. R. Co. v. McComas, 250 U.S. 387, 392, 39 S. Ct. 546 (1918).*

D. A Federal District Court has no subject matter jurisdiction to determine the validity of unpatented mining claims since Congress has given to the Department of the Interior the primary authority for administration and disposition of the public lands. *30 U.S.C. 21, et seq.; Best v. Humboldt Placer Mining Company, 371 U.S. 334, 83 S. Ct. 379 (1963); Del Monte Mining Co. v. Last Chance Mining Co., 171 U.S. 55, 66-67 (1898); Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U.S. 301, 23 S. Ct. 692, 24 S. Ct. 860.*

E. This Court, in previous decisions, has never expressly or impliedly, ruled that the question of jurisdiction of the disposal of public lands is concurrently within the sphere of the legislature or Congress and the Federal Courts. Compare, *Sioux Tribe v. United States, 316 U.S. 317, 324-336 (1942);* But see, *Boesche v. Udall, 373 U.S. 472, 83 S. Ct. 1373 (1963);* The Secretary's plenary authority, as head of an executive department, to promulgate regulations for the government of his department includes the power to provide for administrative appeals within the agency

and not to the Courts. *Davis, Administrative Law #8.18.*

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit.

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CERTIFICATE OF COUNSEL

I, Clement Theodore Cooper, counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Rehearing on Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, was served, personally, on Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530, this day of October, 1975.

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